81-1005

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CLYDE L. SISCO,
Cross-Petitioner,

vs.

J.S. ALBERICI CONSTRUCTION COMPANY, INC.
Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT A CLAIM FOR DAMAGES UNDER 42 U.S.C. §1981, BECAUSE OF A DENIAL OF EMPLOYMENT FOR RACIAL REASONS, IS SUBJECT TO THE DEFENSE THAT THE CHALLENGED EXCLUSION WAS OCCASIONED BY INTENTIONAL DISCRIMINATION UNDERTAKEN PURSUANT TO A RACE-CONSCIOUS EMPLOYMENT EFFORT.

II. WHETHER THE COURT OF APPEALS ERRED IN DENYING A JURY TRIAL ON THE FACTS RELATING TO THE EMPLOYER'S AFFIRMATIVE DEFENSE.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	iii
Table of Authorities	iii
Citation to Opinions Below	1
Jurisdictional Statement	2
Constitutional Provision and Statutes Involved	2
Statement of Case	3
Summary of Argument	5
Argument	6
Conclusion	9
Appendix A — Opinion of U.S. Court of Appeals	A-1
Appendix B — Judgment of U.S. District Court	A-10

TABLE OF AUTHORITIES

Constitutional Provisions Cited

The Seventh Amendment, United States Constitution	2

Cases Cited

Curtis v. Loether, 415 U.S. 189 (1974)	8
Lehman v. Yellow Freight System, Inc., 651 F.2d 520 (7th Cir. 1981)	8

MacDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976) 7

Setser v. Novack Investment Co., 638 F.2d 1137 and 657 F.2d 962 (8th Cir. 1981) (en banc), cert. den. ____ U.S. ____ (1981) 6,8

Sisco v. J.S. Alberici Construction Co., Inc., 655 F.2d 146 (8th Cir. 1981) 1,4,6,8

United Steelworkers of America v. Weber, 443 U.S. 193 (1979) 4,6,7

Statutes Cited

28 U.S.C. §1343 5

42 U.S.C. §1981 2,3,4,6,7

42 U.S.C. §2000e 3,6,7

42 U.S.C. §2000e-5(f) 5

Other

Cong. Globe 29 Cons. 1st Sess. 504 (1866) 7

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CITATION TO OPINIONS BELOW

The opinion of the three judge panel of the Eighth Circuit Court of Appeals containing that Court's decision relating to the issues raised herein by Cross-Petitioner is reported at 655 F.2d 146 (8th Cir. 1981) and printed in the Appendix hereto. Also contained in the Appendix is a copy of the district court's Judgment, Findings of Fact and Conclusions of Law entered April 24, 1980.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit rendered its Opinion herein on July 29, 1981. Cross-Petitioner Sisco received a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit on October 26, 1981 and relies on Rule 19.5 for authority to file this cross-petition.

Jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

CONSTITUTIONAL PROVISION AND STATUES INVOLVED

1. The Seventh Amendment, United States Constitution, provides as follows:

> In Suits at common law, where the value in controversy shall exceed Twenty Dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

2. 42 U.S.C. §1981 provides as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Clyde L. Sisco is a 52 year old white person who was employed steadily by J.S. Alberici Construction Company, Inc. as a journeyman ironworker during the eight year period 1968 through December 6, 1974. In November 1974, Mr. Sisco was employed at one of Alberici's work sites in St. Louis known as the Post Office Project. Mr. Sisco had been appointed by his Union to serve as the ironworkers' on-site "steward" and, as such, was protected from layoffs, except that he was to be the "last man" laid off. On or about November 29, 1974 Mr. Sisco was advised that the ironworker workforce was to be reduced at the Post Office Project and he was to be transferred to some unidentified work site in order that Alberici might employ a minority ironworker to complete the Post Office Project. Mr. Sisco resisted the transfer, citing racial discrimination and the provisions of the applicable collective bargaining agreement purporting to protect "stewards" from layoffs. Consequently, Alberici prematurely shut down the Post Office project and transferred all ironworkers to other work sites. One week later, on December 6, 1974, Mr. Sisco was separated from defendant's employ and thereafter was never recalled.

Mr. Sisco filed his action below alleging racial discrimination and retaliation under 42 U.S.C. §1981 and 2000e. Mr. Sisco sought actual, compensatory and punitive damages under 42 U.S.C. §1981. He made a timely request for a jury trial on his claim under 42 U.S.C. §1981. The district court *sua sponte* denied Mr. Sisco's request for a jury trial. At Alberici's request and over Mr. Sisco's objections the district court consolidated Mr. Sisco's claims with those of another Plaintiff who also accused Alberici of racial discrimination.

A three day bench trial was held in August, 1978. The undisputed evidence indicated that Alberici Construction Company was a government contractor and as such was required to

follow the St. Louis Plan.[1] Mr. Sisco demonstrated that Alberici did not follow the spirit or the letter of the St. Louis Plan when it selected him for separation from the Post Office Project. The evidence showed that the St. Louis Plan had essentially two purposes: (1) To provide goals and timetables for Alberici to attempt compliance with its affirmative action provisions using reasonable good faith efforts (E.g., 41 CFR §60-2.14,2.30, 70.14d); and (2) to protect incumbent employees and nonminority persons from so-called reverse discrimination (E.g., 41 CFR §60-7.20, 7.30). Mr. Sisco was selected for separation from the job site despite his seniority with the company and his status as a union steward. Mr. Sisco was selected for separation solely because of his race. After Mr. Sisco's separation from the job site, Alberici resumed work on the site and reassigned a young black *apprentice* ironworker to the site.

In April, 1980 the district court issued its decision denying all relief to Mr. Sisco. Mr. Sisco appealed to the Court of Appeals for the Eighth Circuit which concluded *inter alia* that Mr. Sisco was entitled to a trial by jury on his claim of retaliation under §1981 and remanded the matter to the trial court for a jury trial on that question. *Sisco* v. *J.S. Alberici Construction Co., Inc.*, 655 F.2d 146 (8th Cir. 1981). The Court of Appeals, however, declined to remand for a jury trial the question of whether Alberici's reliance on its affirmative action effort was proper under 42 U.S.C. §1981. Instead, the Court interpreted *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979) as applicable to actions under 42 U.S.C. §1981 and constituting a bar to Mr. Sisco's recovery. The Court, therefore, affirmed the dismissal of Mr. Sisco's claim under §1981 regarding his separation from the Post Office Project. The Court of Appeals did so based on the district court's conclusion that, "defendant's actions pursuant to the St. Louis Plan are permissible under the circumstances in this case" and without providing Mr. Sisco the benefit of a jury trial on the facts related to that issue.

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[1] The St. Louis Plan is set out at 41 CFR §60-7 (1974)

Mr. Sisco invoked the jurisdiction of the district court under 28 U.S.C. §§1343 and 2000e-5(f).

SUMMARY OF ARGUMENT

The Court of Appeals erred in limiting a claim for damages under 42 U.S.C. §1981 to exclude an employer's intentional discrimination occasioned by race-conscious affirmative action, when such limitation is inconsistent with the language of the statute and the relevant Congressional intent.

The Court of Appeals erred also when it declared the validity of an affirmative action plan is a question of law for the Court and not the jury to decide. In the instant case, there exists a substantial question, capable of different conclusions, as to whether the employer's conduct unnecessarily trammels the interests of the nonminority employee, and that issue should be submitted to a jury for its determination.

ARGUMENT

1. The Court Of Appeals Erred In Holding That A Claim For Damages Under 42 U.S.C. §1981, Because Of A Denial Of Employment For Racial Reasons, Is Subject To The Defense That The Challenged Exclusion Was Occasioned By Intentional Discrimination Undertaken Pursuant To A Race-Conscious Employment Effort.

The decision of the Court of Appeals is based on the mistaken notion that ". . . by approving race-conscious affirmative action by employers in [*United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979)], [the Supreme Court] implicitly approved the use of race-conscious plans to remedy past discrimination under Section 1981." *Setser* v. *Novack Investment Co.* 657 F.2d 962, 966-67 (8th Cir. 1981) (*en banc*) cited with approval by the panel in *Sisco* v. *J.S. Alberici Construction Company, Inc.*, 655 F.2d 146, 149 (8th Cir. 1981).

The Court's holding in *United States Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979) was not addressed to Section 1981. It was restricted to those instances where relief is sought under 42 U.S.C. 2000e.[2] The Court explicitly characterized the *Weber* case as presenting a "narrow statutory issue. . ." *United States Steelworkers of America* v. *Weber*, *supra*. 443 U.S. at 200. *Weber* is a case of statutory construction and *a fortiori* cannot be extended to actions under 42 U.S.C. §1981. The construction afforded Title VII was bottomed on that statute's peculiar legislative history which permitted "the natural inference" that Congress consciously elected to exempt certain affirmative action efforts when it drafted Title VII's prohibition against racial discrimination and did not specifically prohibit preferential treatment. *U.S. Steelworkers of America* v. *Weber*, *supra*. 443 U.S. at 206.

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[2] Title VII of the Civil Rights Act as amended.

There are significant differences between 42 U.S.C. §1981 and 2000e including, but not limited to, origin, language, relief, administrative trappings and the like, the sum of which require the conclusion that the two statutes cannot be read *in pari materia*. *See, U.S. Steelworkers of America* v. *Weber, supra.* at 206 n. 6.

Section 1981 reads, in relevant part, as follows:

> All persons . . . shall have the same rights to make and enforce contracts, to be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property . . . and shall be subject to like punishment, pains, penalties, taxes, licenses, and extractions of every kind, and to no other.

The plain language permits no discrimination, reverse or otherwise. A different result cannot be justified unless the language misstates the actual intent of the 39th Congress when it enacted this Statute.

Section 1981 was enacted because of a Congressional concern that whites and blacks possess the same civil rights. *See,* e.g., *MacDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 289-96 (1976). In response to an objection that the bill gave preferential treatment to blacks, Senator Howard answered, "The bill simply gives to persons who are of different races or colors the same civil rights". Cong. Globe 39th Cong. 1st Sess. 504 (1866). *See, MacDonald* v. *Santa Fe Trail Transportation Co., Supra.*, 427 at 289 n.20.

Absent some legislative action allowing for a Title VII-type defense in an action under §1981, the fit perceived by the Court of Appeals between 1981 and Title VII on this issue, is simply inappropriate. Its decision cannot be justified on the grounds stated and the decision should be reviewed by this Court at this time.

II. The Court Of Appeals Erred In Denying A Jury Trial On The Facts Relating To The Employer's Affirmative Defense.

The Court of Appeals erroneously concluded that the "validity" of defendant's affirmative action effort is ". . . a question of law to be decided by the Court, not the jury". *Sisco* v. *Alberici Construction Co., Inc., supra.* 655 F.2d at 149. The panel relied on the *en banc* decision in *Setser* v. *Novack Investment Company, supra.*, 657 F.2d at 969 wherein the Eighth Circuit concluded that, *as a matter of law:* "the issue of the validity of an affirmative action plan is one for the Court and not the jury." This naked proposition is true only where the facts are so clear as to justify summary judgment and/or a directed verdict.

It will not be true always that the facts attendant to the origin, content and implementation of an affirmative action effort will be so clear and undisputed as to suggest only one conclusion to all reasonable people. *See,* E.g. *Setser* v. *Novack Investment Co.,* 638 F.2d 1137, 1142-43, n.14 and 1145-1146 (8th Cir. 1981) and *Lehman* v. *Yellow Freight System, Inc.,* 651 F.2d 520 (7th Cir. 1981). In those instances, such as the present one, where the facts are subject to different interpretations, the rule stated by the Eighth Circuit deprives the parties of the right under the Seventh Amendment to a jury trial.

The matter at issue is not beyond the ability of a jury to decide by rational means when properly instructed as to the applicable legal rules.

The unspoken consideration present in this case, which may have served to dilute the guaranteed right to a jury trial, is perhaps an undue concern that the traditional jury process will not serve the social objectives implicit in a legitimate affirmative action effort. That policy argument, however, is foreclosed by virtue of the decision in *Curtis* v. *Loether,* 415 U.S. 189, 198 (1974). The traditional powers of the district court to correct errors due to jury prejudice available to the victims of discrimina-

tion who enter our courts as plaintiffs, are equally available to employers in damage actions who are exposed to the same prejudice as defendants.

CONCLUSION

This Cross-Petition raises several important questions of federal law which have not been, but should be, settled by this Court at this time. Specifically, this Court should address the relationship between a claim for damages under 42 U.S.C. §1981 arising out of a denial of an employment opportunity and an employer's race-conscious employment efforts. It is important also that this Court resolve the questions presented herein relating to the parties' right to a jury trial on all issues pertaining to the claim, including the validity of any affirmative defense.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1420

Clyde L. Sisco,
Appellant,

v.

J.S. Alberici Construction Company, Inc.
Appellee.

On Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: January 15, 1981

Filed: July 29, 1981

Before HEANEY, Circuit Judge, GIBSON, Senior Circuit Judge, and ARNOLD, Circuit Judge.

ARNOLD, Circuit Judge.

Clyde L. Sisco appeals from the judgment of the District Court[1] dismissing his claim for damages for unlawful discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, and under 42 U.S.C. §1981. He seeks relief against the J.S. Alberici Company, alleging that he was discharged from

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[1] The Honorable James H. Meredith, Senior United States District Judge for the Eastern District of Missouri.

employment because of his race. Sisco also claims that the District Court wrongly denied his request for a jury trial. We affirm in part and reverse in part.

I. THE FACTS

Alberici, which engages in the construction business nationally and in the St. Louis, Missouri, area, was awarded a contract by the federal government to perform work on the United States Post Office Fixed Mechanization Project at St. Louis. The contract was subject to an affirmative-action plan promulgated pursuant to Parts II and III of Exec. Order No. 11246, 42 U.S.C. §2000e note, and entitled the "St. Louis Plan." The Plan was designed to correct a "pattern of recruitment, hiring, training, referral, and access to union membership that had resulted in the exclusion of minority group persons from . . . meaningful representation in the construction industry." 41 C.F.R. §60-7.10 (1974). The Plan provided, among other things, that certain goals were to be met on the basis of minority personnel working in each specified trade on each of a given contractor's projects, whether federally funded or otherwise, within the City and County of St. Louis during the term of the covered contract. Goals were established for the number of minority hours of employment calculated as a percentage of total hours of employment. For the period ending December 31, 1974, the goal for ironworkers was 7.6 to 9%. For calendar year 1975, the goal was increased to a level of from 9 to 10.4%.

Alberici was required to complete and submit reports to the United States Department of Labor on the percentage of minority employment. The first report on the Post Office project had a beginning date of October 23, 1973. No black ironworker was employed on this project until January 22, 1974. For the reporting period of October 30, 1974, through November 26, 1974, minority "man-hours" amounted to 24% of total man-hours. During that time, there was one minority employee out

of a total of four ironworkers. For the December, 1974, reporting period, only 4% of the man-hours were worked by minority employees. Thereafter, the minority percentage rose back up to acceptable levels, in part because of Sisco's transfer, the circumstances of which we will not describe.

Clyde Sisco, a white male, was employed as an ironworker on the Post Office project. He also held the position of union steward. During the course of work on the project, Alberici determined that it did not need four ironworkers, but that in order to maintain compliance with the St. Louis Plan, a cutback in its force required the maintenance of at least one minority ironworker on the site. Consequently, Sisco and another white ironworker were laid off, while the only black ironworker and the crew foreman, a white male, were retained. Sisco protested this action and informed Alberici that, under the Ironworkers Collective Bargaining Agreement, Sisco, as union steward, was entitled to special treatment. Under the Agreement, the steward is supposed to be "the last man laid off."

Because Sisco "refused to cooperate," a meeting subsequently was held and attended by John C. Bartnett, then the Equal Employment Opportunity (EEO) officer for Alberici, representatives of the union, and Sisco. The parties agreed that the Agreement gave Alberici the right to close down completely the work at the Post Office project site and transfer all ironworkers, including Sisco, to other jobs. After that, Alberici could reopen the project site and assign workers there in compliance with both the Agreement and the St. Louis Plan.

Sisco, along with other workers, was transferred to Alberici's fabrication shop. He and several workers were later transferred to the Chevrolet plant run by Alberici. On December 6, 1974, that plant closed for a period of time, and Sisco was laid off. Shortly thereafter, Sisco went to work for several other construction companies. Although he did not file a grievance with his union, Sisco did file a complaint with the Equal Employ-

ment Opportunity Commission (EEOC) on March 14, 1975.[2] He was issued a notice of right to sue from the EEOC on June 1, 1977, and this action was brought on July 27, 1977.

Sisco's appeal raises the following issues: (1) whether reliance on the St. Louis Plan by the J.S. Alberici Company is an affirmative defense as a matter of law to Sisco's claim of unlawful discrimination; (2) whether Sisco has a cognizable claim for retaliation under 42 U.S.C. §2000e-3(a) and 42 U.S.C. §1981; and (3) whether the District Court erred by denying his request for a jury trial.

After the oral argument in this case, another panel of this Court decided *Setser* v. *Novack Inc. Co.*, 638 F.2d 1137 (8th Cir. 1981). For convenience, we will refer to this panel opinion as *Setser I*. There, the Court held (1) that §1981 actions are triable as of right to a jury, *id.* at 1139-43, and (2) that "a §1981 cause of action . . . encompasses . . . allegations of retaliatory conduct . . .." *Id.* at 1147. In addition, Part II of the opinion in *Setser I* discusses the circumstances in which an affirmative-action plan is a defense to a claim of reverse discrimination. This part of the opinion was, in legal effect, withdrawn when this Court ordered the case, insofar as Part II of the panel opinion was concerned, reheard en banc. Rehearing en banc was not ordered with respect to Part I (jury trial) and II (retaliation) of the panel opinion. After the rehearing, this Court filed a new opinion, *Setser* v. *Novack Inv. Co.*, No. 80-1100 (8th Cir. July 21, 1981) (en banc), which we shall call *Setser II*. In the en banc opinion, the Court lays out the law on the subject of affirmative-action plans as a defense. In brief, an employer who in good faith applies an affirmative-action plan to remedy past discrimination is not in violation of either Title VII or Section

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[2] The EEOC determined that there was reasonable cause to believe that Alberici had discriminated against Sisco because of his race and had retaliated against him because he opposed conduct unlawful under 42 U.S.C. §2000e.

1981, so long as the plan lasts no longer than necessary "to eliminate a manifest racial imbalance," "does not unnecessarily trammel the interests of the white employees," "does not require the discharge of white workers and their replacement with new black hirees," and does not "create an absolute bar to the advancement of white employees . . .." *United Steelworkers* v. *Weber,* 443 U.S. 193, 208 (1979). Thus, the law in this Circuit is now clear on each of the three questions presented by Sisco's appeal. The jury-trial and retaliation issues are settled by the panel opinion in *Setser I,* and the use of the affirmative-action plan as a defense is governed by the opinion of the Court en banc in *Setser II.* We are of course bound by these holdings. We now proceed to apply them to the case before us.

II. THE LEGAL QUESTIONS

A. Trial by Jury

The jury-trial question is concluded in this Circuit by *Setser I.* The District Court (acting before *Setser I* was decided) struck plaintiff's demand for trial by jury. Since plaintiff here pleaded not only a disparate-treatment claim under Title VII, but also a §1981 claim, he was entitled to trial by jury under the Seventh Amendment.

B. The Affirmative Action Plan

It does not automatically follow, however that the judgment must be reversed, and the cause remanded for a complete new trial before a jury. It remains our duty to inspect the record and determine if defendant would in any event be entitled to judgment as a matter of law. Compare *Setser I,* 638 F.2d at 1142-43. Here, the District Court, in its findings of fact and conclusions of law entered after the bench trial, squarely held, relying, *inter alia,* on *Weber,* that "defendant's actions pursuant to the St. Louis Plan are permissible under the circumstances in this case." *Clyde L. Sisco* v. *J.S. Alberici Constr. Co.,* No.

77-0810-C (c), slip op. at 14 (E.D. Mo., April 24, 1980). This holding is fully consistent with the standards recently laid down in *Setser II*, and the validity of the affirmative-action plan itself is, as *Setser II* explains, a question of law to be decided by the court, not the jury.

Here the employer adopted the affirmative-action plan because it had to do business with the United States. It was under pressure from government officials to improve its percentage of minority hours worked. There was a history of exclusion of black workers from the ironworkers' trade in St. Louis. Alberici had decided, for reasons wholly unrelated to race or to Sisco personally, to reduce its force of ironworkers at the Post Office from four to two. In order to accomplish that goal without further worsening its ratio of minority hours, the black ironworker (who had been on the job site longer than Sisco and whose qualifications are not questioned) had to be retained. Of the two employees left, one was white. The St. Louis Plan was temporary, in the sense that its goals were expressed in terms of percentages of hours worked; once the percentages were met, no further action by the company was required. Sisco was not replaced by a new black worker. A qualified black employee with more seniority on the job site was simply retained in preference to Sisco and another white man. For these reasons, we hold that Alberici's initial decision to remove Sisco from the Post Office job was not unlawful.

C. Retaliation

Sisco also claims that his subsequent lay-off from the Chevrolet site, and the failure thereafter of Alberici ever to hire him again, was unlawful retaliation. This portion of the case must be remanded for trial to a jury. We have carefully reviewed the record, including the transcript of testimony and the exhibits, and we are unable to say that Sisco failed to make a submissible case on the question whether Alberici's conduct was

motivated by a desire to retaliate against Sisco because he objected to what he believed was racial dicrimination.

Sisco asserts a retaliation claim under both Title VII and 42 U.S.C. §1981. The relevant portion of Title VII, 42 U.S.C. §2000e-3, reads as follows:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Section 1981 has no specific retaliation provision, but, as we have noted, *Setser I* holds that retaliation, in a racial discrimination context, can violate this provision.

The transfer of ironworkers from the Post Office project, which Sisco opposed, was not unlawful, as we have held above. We agree, however, with the District Court in *Hearth* v. *Metropolitan Transit Commission,* 436 F. Supp. 685, 688 (D. Minn. 1977), that "as long as the employee had a reasonable belief that what was being opposed constituted discrimination under Title VII, the claim of retaliation does not hinge upon a showing that the employer was in fact in violation of Title VII." The Seventh and Ninth Circuits have cited with approval this holding in *Hearth.* See this holding in *Hearth.* See *Berg* v. *La Crosse Cooler Co.,* 612 F.2d 1041 (7th Cir. 1980); *Sias* v. *City Demonstration Agency,* 588 F.2d 692 (9th Cir. 1978). Compare *Setser I,* 638 F.2d at 1146, holding that Section 1981 forbids "a retaliatory response by an employer against . . . an applicant who genuinely believed in the merits of his or her complaint . . .."

Sisco objected that his removal from the Post Office site was unlawful racial discrimination. We cannot say that this belief was unreasonable or in bad faith, even though we today hold,

based largely on case law developed long after the events in issue, that the company's reduction in force was not unlawful. A person in Sisco's position could reasonably have believed, especially in 1974, that racial discrimination in violation of law had occurred[3]. There is also sufficient evidence in the record to make out a jury issue on the question of the employer's motivation. Sisco had worked for Alberici almost continuously for eight years before the post-office incident occurred. Alberici's Mr. Bartnett testified that he "wasn't tickled" with Sisco's resistance to the implementation of the affirmative - action plan. There is evidence that when Sisco was finally let go on December 6, 1974, there was still some work to be performed at the Chevrolet site. Sisco never re-applied to Alberici for a job, but his wife did call Ray Pieper, a vice-president of the company, for whom she had done secretarial work, and told him her husband needed a job. According to Mrs. Sisco, Pieper agreed to check into the matter and call her back, but he never did so. According to Raymond Swarts, Sr., the foreman on the St. Louis post-office project in 1974, Red Weaver, who supervised the work at the Chevrolet plant, said "he has to leave Sisco go, he had orders from the office." And in June or July of 1977, according to Swarts, Weaver said, in Sisco's presence, "My hands are tied. I cannot hire him." A jury could permissibly find on this evidence (though it certainly would not *have* to) that Alberici simply decided to get rid of Sisco and never hire him again because he had protested what be believed to be unlawful treatment. In short, if the case had been tried to a jury, as we hold it should have been, Alberici would not, on this record, have been entitled to a directed verdict on the issue of retaliation.

It follows that the case must be tried again, this time to a jury, but only on the issue of retaliation. Sisco advanced a retaliation theory not only under Section 1981, but also under Title VII. The Supreme Court had indicated that Title VII cases are not triable as of right to a jury. See *Lehman* v. *Nakshian*, 49 U.S.L.

[3] Apparently the EEOC did believe it. See note 2 *supra*.

Week 4835, 4837 (U.S. June 26, 1981) (No. 80-242). The issue of whether Alberici's conduct in laying Sisco off from the Chevrolet job, and thereafter failing to rehire him, was attributable to a desire to retaliate against Sisco for his protest against being removed from the Post Office job, is an issue of fact common and crucial to the retaliation claim either under Section 1981 or under Title VII. Under well-established doctrine, an issue of fact common to a legal and an equitable claim must be tried to a jury, lest Seventh Amendment rights by extinguished by collateral estoppel if the equitable claim is tried first to the court. See *Setser I,* 638 F.2d at 1141 & n.8. The District Court may wish to submit the case to the jury on special interrogatories as to retaliatory intent and damages, but we leave the method of trial to its sound discretion. If on the new trial Sisco presses his prayer for reinstatement, and if the jury verdict on the issue of retaliation is in his favor, whether to award the equitable relief of reinstatement will be for the court to decide. Ordinarily reinstatement follows a finding of Title VII or Section 1981 liability in employment-discrimination cases, but there can be extraordinary circumstances that would make this remedy inequitable. We imply no view on the merits of this question.

The judgment, insofar as it dismissed Sisco's claim arising out of his removal from the post-office job becaue of the St. Louis Plan, is affirmed. As to the retaliation claim, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion. Each side is to bear its own costs on this appeal. Since it remains to be seen whether Sisco will prevail on any aspect of his case, attorneys' fees are not allowed at this time.

It is so ordered.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 77-0810-C (C)

Clyde L. Sisco,
Plaintiff,

v.

J.S. Alberici Construction Company, Inc.,
Defendant.

CONSOLIDATED WITH

Cause No. 77-0964-C (C)

Philip Person,
Plaintiff,

v.

J.S. Alberici Construction Company, Inc.,
Defendant.

JUDGMENT

Findings of Fact and Conclusions of Law dated this day are hereby incorporated in and made a part of this judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiffs' actions against defendant Alberici for damages are hereby denied.

IT IS FURTHER ORDERED that the motion for attorney's fees submitted by defendant Alberici as to plaintiff Person in the amount of $6,000 is denied.

These causes are dismissed with prejudice.

Dated this 24th day of April, 1980.

/s/ J. H. Meredith
United States District Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was tried to the Court. The Court has been duly advised by testimony, exhibits, and briefs of the parties. The Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. Defendant J.S. Alberici Construction Company, Inc. ("Alberici"), is a Missouri corporation engaged in the business of construction nationally and in the St. Louis area.

2. Plaintiff Clyde L. Sisco is white citizen of the United States who was qualified for employment as an ironworker.

3. Plaintiff Philip Person is a black citizen of the United States who was qualified for employment as a carpenter and who had also had some limited experience working as a millwright.

4. Prior to June, 1974, Alberici was awarded a contract from the United States for the United States Post Office Fixed Mechanization Project, located at the U. S. Post Office, St. Louis, Missouri.

5. Because the project invovled more than $500,000 and was funded by the federal government, the contract was awarded subject to the requirements of the "St. Louis Plan."

6. The St. Louis Plan was adopted after public hearings were held by the Department of Labor in St. Louis, Missouri, on October 31 and September 1, 1970, and was designed to correct a "pattern of recruitment, hiring, training, referral, and access to union membership that had resulted in the exclusion of minority group persons from . . . meaningful representation in the construction industry."

7. The Ironworkers and Carpenters Unions were among those which had underrepresentation of minorities, and to which plaintiffs Sisco and Person belonged, respectively. Only two percent of journeymen ironworkers were minorities and only six percent of the carpenters were minorities prior to 1970.

8. The St. Louis Plan provided *inter alia* that integration goals set up under the plan were to be met and assessed on the basis of minority personnel working in each specified trade on each of a given contractor's projects, whether federally funded or otherwise, within the City of St. Louis and St. Louis County, Missouri, during the term of the covered contract.

9. The St. Louis Plan established goals for minority employment, therefore, based on the number of minority hours of employment calculated as a percentage of total hours of employment.

10. The goals established for the ironworkers were 7.6 percent to 9 percent for calendar year 1974 and 9 percent to 10.4 percent for calendar year 1975. The goals established for the carpenters were 6.7 percent to 8.2 percent for calendar year 1974 and 8.2 to 8.9 percent for calendar year 1975.

11. With respect to the percentages of minority hours of employment reported by Alberici, the St. Louis Plan provides:

> "Each agency shall review contractor's and subcontractor's employment practices during the performance of the contract. If the contractor or subcontractor

meets its goals or if the contractor or subcontractor can demonstrate that it or the labor union has made every good faith effort to meet those goals, the contractor shall be presumed to be in compliance with Executive Order 11246 . . . and no formal sanctions or proceedings leading toward sanctions shall be instituted unless the agency otherwise determines that the contractor or subcontractor is not providing equal employment opportunities. . . ."

12. On November 9, 1973, the Ironworkers Union, Local 396, in response to charges of discriminatory practices, entered into a consent decree with the United States of America before this Court. This decree had as its goal increased minority participation in the ironworker craft and, among other things, provided that:

> "Contractors who are obligated to meet specific affirmative action general conditions and specifications or other affirmative action requirements as imposed by any governmental agency (federal, state or local) may request ironworkers from either Group I or II, specifying the race of the workers needed; in such instances, the unions shall refer the requested number of individuals by race if available, regardless of their position on the referral list."

13. Defendant Alberici maintained an official Equal Employment Opportunity ("EEO") policy and an affirmative action program during the relevant time period of these consolidated actions. Defendant hired John C. Bartnett as its EEO officer to investigate allegations or complaints of racial discrimination raised by any employee or officer of Alberici relating to work done on any of Alberici's work sites. Mr. Bartnett participated in the initial stages of the resolution of the labor disputes involved in these actions.

14. On the Post Office Project, Alberici employed ironworkers and carpenters who were, respectively, members of the International Association of Bridge, Structural, and Ornamen-

tal Ironworkers, Machinery Movers and Riggers, Local No. 396, AFL-CIO ("Local 396"), and the Carpenters District Council of St. Louis, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

Claims of Plaintiff Sisco Against Defendant

15. Clyde L. Sisco ("Sisco"), is a white male ironworker who is a member of Local 396, who commenced his employment with the defendant on the Post Office Project on or about September 19, 1974.

16. At all times relevant to this action, defendant Alberici, as a member of the Associated General Contractors of St. Louis, was a party to the 1972-1975 Collective Bargaining Agreement with Local 396.

17. In accordance with Section 7.20 of the 1972-1975 agreement, plaintiff Sisco was appointed as the union's steward on the Post Office Project. Section 7.20 provides in pertinent part:

> "The employer agrees that the steward will not be discharged until after proper notification has been given to the union, and further, when employees are laid off, the job steward will be the last man laid off provided he is capable of doing the work in question."

The Ironworkers Collective Bargaining Agreement further provides:

> "Section 1.02 Right to Hire: The employer reserves and shall have the right to accept or reject, to employ or not to employ, any persons furnished by the union or to discharge any employee who has been accepted but who subsequently proves unsatisfactory to the employer.
>
> "The employer shall be the sole judge of and have the right to determine, consistently with the provisions of this

agreement . . . the number of employees required on any job, or any portion of the work being done by employer.

"Section 1.03: . . . The employer reserves the right to reject persons furnished by the union.

"Neither the union nor the employer shall discriminate in the referring or hiring of employees because of age, race, color, religion, sex, national origin or union membership. In the event of a reduction of forces of a job, there shall be no discrimination in the layoff because of age."

18. The November 9, 1973, consent decree between Ironworkers Local 396 and the United States of America provided, among other things, that:

"30. Any minorities registered for referral shall be permitted to solicit and accept jobs directly from contractors, regardless of union membership. . . . [A]ny contractor may at its option hire [minorities] directly without using the routine referral procedures otherwise required by the collective bargaining agreement. . . . Local 396 will accept service dues and issue a receipt to any minority a contractor wishes to hire, regardless of the existence of unemployed members at that time. Neither Local 396 nor its agents will engage in any activities, the purpose or effect of which is to dissuade its contractors from hiring such persons, to encourage its contractors to hire union members instead of such persons, or to encourage its contractors to lay off such persons instead of union members."

19. At some time in late November, 1974, Alberici determined that the requirements of the Post Office job did not merit the maintenance of four ironworkers, and a decision was made at that time to reduce the number of ironworkers at the Post Office from four to two.

20. Alberici determined that in order to maintain its compliance with the requirements of the St. Louis Plan, a cutback in

its ironworker force required a maintenance of one minority ironworker on the site.

21. It was the convention of the industry to keep an ironworker foreman employed as well as an ironworker. Alberici determined that in order to maintain its compliance with the St. Louis Plan at the Post Office Project, the reduction of the ironworker force was to be achieved by laying off plaintiff Sisco and one other ironworker, while retaining a foreman, Raymond Swartz, and the only black ironworker at the Post Office Project, Walter Hill.

22. Walter Hill was a black male ironworker and a member of Local 396 who had been a journeyman ironworker since August 2, 1973, and who had been employed on the Post Office Project since September 5, 1974, prior to plaintiff Sisco's hiring date.

23. Walter Hill's race was taken into consideration in the determination of whether to keep him on at the Post Office Project.

24. Sisco objected to being laid off because, pursuant to the Ironworkers Collective Bargaining Agreement, the union steward was to be the last ironworker laid off besides the foreman under such a reduction in work force.

25. In response to Sisco's objection to the proposed layoff, a meeting was held at the Post Office between Alberici's EEO officer, officers and representatives of the Ironworkers' Union, and plaintiff Sisco.

26. It was agreed by both the representatives for the Ironworkers' Union, Local 396, and Alberici that in order to achieve integration goals, the Ironworkers' Collective Bargaining Agreement gave Alberici the right to completely close down the work at the Post Office and transfer all ironworkers, including plaintiff Sisco, to other jobs. Thereafter, Alberici would be able to reopen the Post Office Project and assign other ironworkers

in compliance with both the collective bargaining agreement and with the St. Louis Plan.

27. On November 29, 1974, Alberici exercised its right to close down the ironworker work in order to transfer the ironworkers off of the Post Office Project. Ironworkers, other than Sisco and Hill, were thereafter assigned to the Post Office Project in such a manner as to maintain the percentage of minority hours of ironworker employment necessary for defendant to continue to meet the goals of the St. Louis Plan. One white foreman and one black ironworker were subsequently retained at the Post Office Project.

28. Sisco was sent to Alberici's fabrication shop, and was thereafter transferred to work at Alberici's project at the Chevrolet plant.

29. Sisco was laid off from work at the Chevrolet plant on December 6, 1974.

30. Alberici terminated all work for ironworkers at the Post Office Project on or about May 8, 1975.

31. The Ironworkers' Collective Bargaining Agreement contains no provision for the recall of laid off ironworkers.

32. The Ironworkers' Collective Bargaining Agreement contains provisions regarding grievance procedures in the event of labor disputes.

33. Plaintiff Sisco did not file a grievance with the union pursuant to the terms of the Ironworkers' Collective Bargaining Agreement concerning the matters with Alberici at the Post Office.

34. Plaintiff Sisco filed his initial charge of discrimination with the EEOC on March 19, 1975.

35. Following plaintiff's layoff in December of 1974, there was a limited amount of employment available for "outside"

ironworkers of Local 396, such as plaintiff Sisco, during the winter months of 1974 and 1975.

36. Following plaintiff's layoff on December 6 from the Chevrolet plant worksite, Chevrolet rehired Alberici to provide ironworkers at the Chevrolet worksite from December 30, 1974, through January 3, 1975. The next period when work for ironworkers was again available at the Chevrolet plant occurred when plaintiff Sisco was already engaged in full-time employment with Hercules Construction Company.

37. Sisco was employed with Hercules Construction Company on December 18, 1974, and at various times thereafter. This employment resulted from plaintiff's efforts in calling Hercules Construction Company and not as a result of a referral by Local 396. Thus, Sisco was employed as an ironworker with Hercules Construction Company prior to the time that Alberici had any need for additional ironworkers at the Chevrolet plant.

38. Additionally, Sisco was engaged in work for the Franklin Crest Construction Company on December 16, 1974, and for Hercules Construction Company on December 18, 1974.

39. Sisco ended his employment with Hercules Construction Company on or about December 24, 1975.

40. Sisco was not available for work from February 11, 1975, through April 1, 1975, because of a medical condition that required surgical treatment.

41. Sisco's income from his work with Franklin Crest and Hercules Construction Companies exceeded the amounts he could have expected from his work with defendant Alberici if he had remained at either the Post Office or the Chevrolet plant projects.

42. Sisco's earnings from employment during and after the time of the events involved in this case were as follows for the indicated periods:

Calendar Year	Earnings
1974	$16,858.00
1975	13,428.00
1976	8,625.80
1977	15,961.00
1978	20,866.84

43. Ironworkers employed by Alberici in its fabrication shop, "the yard", were represented by Local 518 of the Ironworkers Union as opposed to Local 396, of which Sisco is a member. Pursuant to a contract dated January 24, 1975, between Alberici, Local 518, and Local 396, members in Sisco's Local 396 could not be employed in the fabrication shop if they were not so employed on January 25, 1975. Thus, a substantial amount of work was no longer available for Sisco by virtue of the collective bargaining agreement entered into by his bargaining agent, Local 396, and representatives of Local 518.

44. Sisco admits that his prior employment with Alberici was marked by periods of occasional layoffs. The record shows that a substantial portion of Sisco's employment with Alberici was at Alberici's fabrication shop.

Claims of Plaintiff Person Against Defendant

45. Plaintiff Person is a member of the Carpenters & Millwrights Union. This cause of action arises out of his termination from employment by defendant at the Post Office Project.

46. The majority of the work performed by members of the Carpenters Union, of which plaintiff Person was a member, on the Post Office Project was millwright work. The evidence shows that there were 50-60 millwrights and only two carpenters.

47. The Carpenters Union includes carpenters who work with wood in various ways, and millwrights who work with assembly and repair of machinery. The work of millwrights is significantly different from the work of carpenters, requiring different experience, skills, and tools.

48. For the year 1974, the St. Louis Plan set goals for employment of minority carpenters at a range of 6.7 percent to 8.2 percent minority hours of employment. For the year 1974, the percentage of minority membership of the Carpenters Union amounted to 6 percent. Alberici employed minority carpenters at the Post Office Project and achieved the following percentages of minority hours of carpenter employment for the indicated periods:

Reporting Period	Percentage of Minority Hours
12/25/73 - 1/15/74	4%
1/22/74 - 2/12/74	11
2/19/74 - 3/12/74	9
3/19/74 - 4/ 9/74	9
4/16/74 - 5/14/74	9
4/16/74 - 5/14/74	9
5/21/74 - 6/11/74	no hours for carpenters
6/18/74 - 7/ 9/74	8
7/19/74 - 8/13/74	6
8/20/74 - 9/17/74	9%
9/18/74 - 10/29/74	9
10/30/74 - 11/26/74	13
12/74	8

49. Person applied for employment with Alberici in late June or early July of 1974.

50. Person was advised by Alberici that the latter did not have need for carpenters at that time but was employing some millwrights at the Post Office.

51. Person represented to Alberici that he was an experienced millwright and a journeyman carpenter.

52. In fact, Person had never done millwright work before for a construction company and had never done any conveyor hanging or similar work of the type which he was required to do at the Post Office.

53. Based on plaintiff's representations, Person was employed by Alberici as a millwright on the Post Office Project.

54. At the Post Office, Person reported to Vern Richardson, Superintendent over all Alberici millwrights, and thereafter to Ernie Richardson, the millwright General Foreman at the Post Office.

55. Person advised Richardson that he had no prior millwright experience and was instructed to learn the trade from the other millwrights on the job.

56. Person was assigned to a work crew led by Dannie Barton, and he told Barton that he had done a little bit of millwright work.

57. It is customary in the millwright trade for the older and more experienced millwrights to supervise and instruct the younger, inexperienced millwrights.

58. Approximately a week after Person began working at the Post Office, Ernie Richardson received an initial complaint regarding Person, the substance of which was that he could not follow direction of the person with whom he was working.

59. The crew to which Person was assigned worked on the ground floor and was responsible for unloading materials and assembling portions of a conveyor system.

60. Several weeks later Person was paired with Bill Erickson, an older and more experienced millwright.

61. In the pairing of millwrights, the more experienced millwright has no formal supervisory title, but under the custom of the industry it was normal for Erickson to instruct Person.

62. Person objected to Erickson's instructing him and felt that Erickson was acting as a foreman and that Person was acting as a laborer under the arrangement. Person objected to the tone and manner of Erickson's voice and his suggestive manners.

63. Approximately a week before Person was transferred from the Post Office worksite, Erickson complained to Ernie Richardson, millwright General Foreman, that Person refused to do what he was instructed to do and that Erickson refused to work any longer with Person.

64. Members of Barton's millwright crew refused to work with Person because he wouldn't listen and follow directions when members of the crew tried to instruct him on how to perform various jobs. Person felt discriminated against because Erickson did not always assist in unloading trucks. In unloading trucks, Person performed the same work as did the other men in his crew.

65. Person experienced what he described as a personality clash with Erickson because of Erickson's age.

66. Barton advised Ernie Richardson, millwright General Foreman, of Erickson's problems and was told to send Erickson to see Ernie Richardson.

67. No written complaint was issued to Person from his foreman, Mr. Barton, and it was not the practice in the construction trade with carpenters to issue such written complaints.

68. Barton placed Person with different members of his crew and Person experienced the same type of problems with each of them.

69. After a lengthy period of alternate placements, Barton concluded that Person should be discharged because of his uncooperative attitude.

70. Ernie Richardson spoke to Person regarding the complaint. He encouraged Person to try to get along better with the members of his work crew, and told him that each new person in the construction or millwright union was treated in the same manner as was Person.

71. After several discussions were held regarding Person's inability to get along with fellow coworkers, Don Carlson, the Post Office Project manager for Alberici, discussed with Mr. Bartnett, Alberici's EEO officer, the fact that Person was a minority group member on the Post Office Project who was not qualified to perform the work and could not function properly.

72. Vernon Richardson, superintendent of all millwrights for Alberici, informed Bartnett that Person was unqualified and did not have an attitude for learning.

73. Bartnett, as Alberici's EEO officer, advised Carlson that if Person was not qualified to do the work, it was not an EEO matter and he should be discharged.

74. Bartnett received no official complaint from Person regarding the alleged discrimination.

75. Because of Person's inability to do millwright work, he was laid off on August 5, 1974.

76. Thereafter, Person met with Edward Calcaterra and sought reemployment. Calcaterra advised Person that no millwright work was then available, and that he would try to place him as a carpenter. Person then advised Calcaterra that he did not want to work as a carpenter but requested to be reemployed as a millwright, a position with which Person had little or no experience.

77. On August 8, 1974, after Person was laid off, he filed a grievance with the Carpenters Union.

78. Person's grievance was denied by the Carpenters Union on or about August 20, 1974, on the basis that plaintiff's complaint arose from personality differences with coworkers as opposed to racial discrimination on the part of defendant Alberici.

79. Thereafter, Person secured employment with the Rallo-Alberici Joint Venture at the Convention Center on August 21, 1974 as a carpenter.

80. Person was paid the same rate of pay as he was at the Alberici Construction Company prior to his layoff.

81. Person voluntarily quit his work with Rallo Contracting Company, Inc., to work for Ralston Purina Company as a carpenter on a permanent basis. Person worked with Ralston Purina until April, 1978, when he voluntarily quit work to go into business for himself.

82. Person's earnings form employment during and after the time of the events involved in this case were as follows for the indicated periods:

Calendar Year	Earnings
1974	$10,262
1975	13,711
1976	14,582
1977	17,803
1978	9,800

Conclusions of Law

1. The action brought by plaintiff Person is predicated on 42 U.S.C. § 1981. This Court has jurisdiction pursuant to 28 U.S.C. § 1343.

2. The action brought by Sisco is predicated upon 42 U.S.C. § 1981 and 2000e, *et seq.* The Court has jurisdiction pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 2000e-5(f).

3. Defendant Alberici is an employer within the meaning of Title VII of the Civil Rights Act of 1964.

4. Affirmative action programs establishing favorable employment quotas for members of minority groups are not per se unconstitutional or illegal, and defendant's actions pursuant to the St. Louis Plan are permissible under the circumstances in this case. *E.E.O.C.* v. *Contour Chair Lounge Co., Inc.*, 596 F.2d 809 (8th Cir. 1979).

5. The St. Louis Plan and Executive Order 11246 implementing affirmative action plans on government contractors are a valid exercise of executive power. *Contractor's Assn. of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971).

6. Title VII does not prohibit all race conscious affirmative action. *United SteelWorkers of America, AFL-CIO* v. *Weber, et al.*, ____ U.S. ____ (decided June 27, 1979).

7. The Legislative History of Equal Employment Opportunity Act of 1972 establishes that Executive Order 11246 and the St. Louis Plan established pursuant thereto do no conflict with the requirements of Title VII.

8. In this case, defendant Alberici, acting with due regard to the St. Louis Plan and with knowledge of the consent decree entered into between plaintiff Sisco's union and defendant, decided to terminate Sisco's employment. Its decision to terminate plaintiff Sisco was not based on discrimination because of race. Therefore, plaintiff Sisco is not entitled to recover under Section 1981 and Title VII. The black retained had been employed prior to plaintiff Sisco and had more seniority on the job.

9. A punitive damage award in favor of plaintiff Sisco is inappropriate under the facts in this case, in that defendant has not been shown to have acted in willful disregard of clear existing law.

10. The termination of Person by Alberici was because of Person's lack of qualifications to perform his work as a millwright and not because of his race. As such, his termination did not violate 42 U.S.C. § 1981. *Christian* v. *General Motors Corporation*, 341 F. Supp. 1209 (E.D. Mo. 1972), *aff'd*, 475 F.2d 1407 (8th Cir. 1973).

11. Alberici's offer to reemploy Person after his layoff as a carpenter, which offer was rejected, terminates Alberici's liability, if any, to Person for back pay as of the date of the offer. *NLRB* v. *Bishop*, 228 F.2d 68 (6th Cir. 1955).

12. Even if Person were entitled to recovery, his voluntary abandonment of his subsequent employment with Rallo Contracting Company, Inc., terminated Alberici's liability for back pay as of the date of this abandonment. *McLaughlin* v. *Mercury Freight Lines, Inc.*, 5 E.P.D. § 8560 (1972), *aff'd*, 472 F.2d 1406 (8th Cir. 1973).

13. Because defendant has not been shown to have acted recklessly or in willful disregard of clear existing law, plaintiff Person is not entitled to recover punitive damages in this case.

14. Defendant's motion for attorneys' fees in this case is denied.

Dated this 24th day of April, 1980.

/s/ J.H. Meredith
United Stated District Judge